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Supreme Court

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United States

OCTOBER TERM, 1976

Case No. 76-1760

S. D. COHN & COMPANY and SIDNEY D. COHN,
Petitioners,

vs.

SHIRLEY WOOLF and ROBERT MILBERG, and FIBERGLASS RESOURCES CORPORATION,
Respondents.

BRIEF FOR RESPONDENTS SHIRLEY WOOLF AND ROBERT MILBERG IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
A. OPINIONS BELOW	2
B. GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED	2
C. QUESTIONS PRESENTED	2
D. STATEMENT OF THE CASE	3
E. REASONS FOR DENYING THE WRIT ...	3
F. CONCLUSION	8
G. CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

Cases	Page
Brotherhood of Locomotive Fireman v. Bangor and Aroostook R.R., 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967)	5
Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 reh. den. 425 U.S. 986, 96 S.Ct. 2194, 48 L.Ed.2d 811 (1976)	6, 7
S.E.C. v. Continental Tobacco Co., 5 Cir. 1972, 463 F.2d 137	7
S.E.C. v. Ralston Purina Co., 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953)	7
TSC Industries v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976)	3

OTHER AUTHORITIES

Supreme Court of the United States, Revised Rules, Effective July 1, 1970, Rule 19(1)(b)	5

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A

OPINIONS BELOW

The instant Petition for a Writ of Certiorari aptly sets forth the opinions below. In this brief in opposition, the symbol "A" will refer to the appendix attached to the Petition for Certiorari, which Respondents adopt in full, and the symbol "R" will refer to the trial transcript of record.

B

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdictional requisites have been properly set forth in the Petition.

C

QUESTIONS PRESENTED

WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ON REMAND FROM THIS COURT FOR RECONSIDERATION OF THIS CAUSE IN LIGHT OF *TSC INDUSTRIES v. NORTHWAY, INC.*, 426 U.S. 438, 96 S.CT. 2126, 48 L.ED.2D 757 (1976), PROPERLY REMANDED THE CAUSE TO THE DISTRICT COURT FOR FURTHER RECONSIDERATION.

D

STATEMENT OF THE CASE

By Order dated June 21, 1976, in #75-969, this Honorable Court granted Petitioners' Petition for Writ of Certiorari, vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for further consideration in light of *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) (A-76).

On remand from this Court, the Court of Appeals entered a per curiam opinion (A-73-75), February 14, 1977. The Court of Appeals quoted the definition of "materiality" adopted by this Court in *TSC Industries v. Northway, Inc., supra,* quoted the definition of materiality applied in the opinion of the Court of Appeals in this cause and vacated the previous judgments and remanded the case to the District Court for reconsideration in light of *TSC Industries v. Northway, Inc.* There was no other substantive discussion in the opinion on remand (A-73-75).

E

REASONS FOR DENYING THE WRIT

THIS COURT OF APPEALS COMPLIED WITH THE MANDATE OF THIS COURT AND REVIEW BY CERTIORARI IS INAPPROPRIATE.

The instant Petition for Certiorari seeks review of an Order of the Court of Appeals for the Fifth Circuit entered in strict accordance with this Court's mandate for reconsideration in light of *TSC Industries v. Northway,*

Inc. The Court of Appeals adopted the Supreme Court's definition of materiality as defined in *TSC* and remanded the matter for reconsideration to the District Court.

The Court of Appeals expressly followed the Order of this Court, after receiving briefs in which Petitioners assert the same arguments made herein. The failure of Petitioners to file a motion seeking compliance with the mandate of this Court should be conclusive on that point. We submit therefore that the Petition for Certiorari is nothing more than a Petition for Rehearing of the Court's original Order of June 21, 1976. Petitioners' arguments in support of the Petition for Certiorari are not directed to the order of the Court of Appeals on remand from this Court, but to the original opinion (A-10-52) and opinion on rehearing (A-1-7) of the Fifth Circuit which this Court previously reviewed in #75-969, which resulted in the remand for reconsideration.

Petitioners' complaint that the Court of Appeals substituted its judgment on the facts for that of the District Court arises from the original opinion of the Fifth Circuit, which has been reviewed by this Court previously. Petitioners' complaint that the Court of Appeals imposed the burden of proof on them as to the availability of the 4(2) exemption arises from the original opinion of the Court of Appeals, which has been reviewed by this Court previously. Petitioners' complaint that the Court of Appeals omitted discussion of "Scienter" arises from the original opinion of the Court of Appeals which has been reviewed by this Court previously. In sum, every argument raised in the Petition for Certiorari goes to the original opinion and judgment of the Court of Appeals and not to the

Order on remand from this Court, the Order which is the basis for the instant Petition for Certiorari.

Rule 19.1(b) of this Court provides the character of reasons which will be considered by this Court as constituting the special and important reasons required for granting a Petition for Writ of Certiorari. The instant Petition utterly fails to indicate conflict with the decision of another Court of Appeals; a decision on an important question of Federal law which has not, but should be, settled by this Court; or to indicate a conflict with applicable decision of this Court; nor does the Petition indicate a departure from the accepted and usual course of judicial proceedings to call for an exercise of this Court's supervisory powers.

Indeed, since the Court of Appeals remanded the case for reconsideration by the District Court, review by Certiorari is inappropriate. *Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R.*, 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967).

THE COURT OF APPEALS DID NOT DISPENSE WITH "SCIENTER" AND DID NOT ERR IN IMPOSING THE BURDEN OF PROOF ON DEFENDANTS.

In its opinion on remand from the Supreme Court (A-73-75), the Court of Appeals made no findings of fact; there was no discussion of burden of proof; and there was no discussion of "Scienter." Petitioners state at Page 22 of the Petition as reasons for granting the Writ that the "Court of Appeals set forth erroneous standards for re-

covery in 10 b-5 case, by dispensing with "Scienter" and imposing burden of proof on Defendants; *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976), not followed."

We respectfully submit that not only are these arguments directed to the original opinion and opinion on rehearing of the Court of Appeals (A-10-52; 1-7) but that they are so clearly without merit that any response gives such contentions a dignity they do not deserve. Negligent omissions and negligent misrepresentations are not now, nor never have been, an issue in this case. The trial court in its Conclusion of Law Number One, applied an actual knowledge standard of "Scienter." Petitioners admit in the Petition for Certiorari that a scienter standard was applied. The Petitioners state "Plaintiffs claimed material omissions, with scienter, and they had opportunity to prove the claim below." (Petition for Certiorari page 28.) The Court of Appeals reversed as stated in its opinion on rehearing (A-1-7; 10-52) for reconsideration in view of "the stringent disclosure requirements our Court has held necessary in the private placement context" rather than focusing on specific misrepresentations alleged. For example, as discussed in the original opinion of the Court of Appeals (A-16), it is undisputed that the prior financial history of the Lamtex subsidiary of Koppers, the predecessor of Fiberglass, was not disclosed to investors (A-16).

Cohn testified that he did not obtain such financial statements because they were probably inaccurate (A-16). Cohn's failure to obtain such information for "probably inaccuracy" is an intentional withholding of information by his own admission. We submit there can be no more

material information than the financial history of a predecessor's company, which is required disclosure in every registration statement filed on any form with the Securities and Exchange Commission. Its materiality is so obvious that it should be required disclosure as a matter of law. In any event, the operating results of Lamtex subsidiary, under Medney's presidency, was certainly material as a measure of Medney's managerial expertise since he was to be the chief executive and operating manager of Fiberglass (A-12, 13).

Since the trial court and the parties anticipated this Court's decision in *Ernst & Ernst v. Hochfelder, supra,* there was no reason for the Fifth Circuit to discuss "Scienter" requirements in 10b-5 litigation in its opinion on remand or in its earlier decisions.

In its original opinion (A-10), the Court of Appeals held that the burden of proof as to the availability of an exemption from registration, rested on the party claiming such exemption. In so doing, the Court of Appeals followed a long line of precedent from *S.E.C. v. Ralston Purina Co.*, 1953, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 to *S.E.C. v. Continental Tobacco Co.*, 5 Cir. 1972, 463 F.2d 137. The Court of Appeals concluded its original opinion by holding (A-52), "it follows that they [Plaintiffs] must show that the omissions and misrepresentations of the information that make Section 4(2) unavailable to the

Defendants in their cumulative effect were such that a reasonable investor, might have considered them important in the making of his investment decision."

This Court has corrected the use of the word "might." The burden of proof is clearly on the Plaintiff to establish that the omissions or misrepresentations, which make the exemption unavailable, were material to the investment decision.

Since the Court of Appeals did not eliminate the "Scienter" requirement and since the Court of Appeals requires the Plaintiff to establish the materiality of the claimed omissions, Petitioners' stated grounds for the granting of the Writ are without merit.

CONCLUSION

For the reason that the Order of the Court of Appeals complied in all respects with the mandate of this Court and for the reason that review by Certiorari is inappropriate since the cause was remanded for additional trial proceedings, the Petition for Certiorari should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the Brief in Opposition to the Petition for Writ of Certiorari has been mailed this 14th day of July, 1977, to: Robert Orseck, Esquire, Attorney for Petitioners, 25 West Flagler Street, Suite 1201, Miami, Florida 33130, and to Terrence Russell, Esquire, 900 N.E. 26th Street, Ft. Lauderdale, Florida, Attorneys for Fiberglass Resources Corp., in accordance with Rule 33 of this Court.

By /s/ Richard E. Reckson